RECORD AND BRIEFS

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In the

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL ORGANIZATION FOR MARRIAGE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Jack Phillips is a cake artist. The Colorado Civil Rights Commission ruled that he engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act ("CADA") when he declined to design and create a custom cake honoring a same-sex marriage because doing so conflicts with his sincerely held religious beliefs.

The Colorado Court of Appeals found no violation of the Free Speech or Free Exercise Clauses because it deemed Phillips' speech to be mere conduct compelled by a neutral and generally applicable law. It reached this conclusion despite the artistry of Phillips' cakes and the Commission's exemption of other cake artists who declined to create custom cakes based on their message. This analysis (1) flouts this Court's controlling precedent, (2) conflicts with Ninth and Eleventh Circuit decisions regarding the free speech protection of art, (3) deepens an existing conflict between the Second, Third, Sixth, and Eleventh Circuits as to the proper test for identifying expressive conduct, and (4) conflicts with free exercise rulings by the Third, Sixth, and Tenth Circuits.

The question presented is: Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principles at issue in this case that the state may not compel individual citizens to speak a message they oppose or to violate the dictates of their religious faith. The Center has previously participated in a number of cases before this Court of constitutional significance addressing religious liberty and freedom of speech, including *Burwell v. Hobby Lobby*, 134 S. Ct. 678 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012).

National Organization for Marriage ("NOM") is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. Since its founding in 2007, NOM has spent more than eight million dollars in campaign efforts to preserve the traditional definition of marriage. The Washington Post has described NOM as "the preeminent organization dedicated" to preserving the definition of marriage as the union of a husband and wife. Monica Hesse, "Opposing Gay Unions With Sanity

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

and a Smile," Washington Post, at C01 (Aug. 28, 2009).

SUMMARY OF ARGUMENT

The freedom of speech protects against government compulsion to speak another's message. Newspapers cannot be forced to print messages from those they criticize, car owners cannot be forced to display political messages, children cannot be forced to recite the pledge of allegiance, parades cannot be forced to include other viewpoints, utilities cannot be forced to include brochures for consumer advocates in the utility's billing envelope, and government workers cannot be forced to even pay for the political speech of labor unions. The court below, however, ruled that artists who charge for their work lose their First Amendment rights of free expression. In this, the lower court followed the flawed reasoning of the New Mexico Supreme Court to rule against petitioner's speech rights. These rulings betray a fundamental misunderstanding of the freedom of speech jurisprudence of this Court.

The court below also reduced the guaranty of free exercise of religion to a protection of mere private belief. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), this Court sought to give assurance to religious faithful:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach

> the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

The tens of millions of Muslims, Orthodox Jews, and Christians in America who teach and believe that marriage is a relationship between one man and one woman hoped that this statement of the Court meant that they could still practice their faith. The court below, and other state courts, however, have adopted a policy of stamping out any opposition to same-sex marriage. People of faith may be entitled to "believe" and "advocate," but they are certainly not free to practice their faith under the Colorado ruling.

The Free Exercise Clause, however, protects the *exercise* of religion. People of faith, and the Founders that included that protection in our Constitution's list of fundamental liberties, understand that to mean the right to live one's faith.

ARGUMENT

I. The First Amendment Protects Against Compelled Speech.

The court below asserted that it was not ruling that status as a for-profit business strips one of First Amendment protections. But it quoted the New Mexico Supreme Court decision in *Elane Photography LLC v. Wilcock*, 309 P.3d 53, 68 (N.M. 2013) for the proposition: "While photography may be expressive, the operation of a photography business is not." *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 287 (Col. Ct. App. 2015). This Court has firmly rejected this position. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid

to speak." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116-17 (1991). The distinction the court below attempted to draw between creation of expressive art and charging a fee to create expressive art has no basis in First Amendment law.

There should be no question that that custom-designed cake decoration art at issue here is expressive conduct within the protection of the First Amendment. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 231 (1977) ("But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection."). Artwork, whether a custom-designed wedding cake, a modern art sculpture, or a nude painting is expressive and thus entitled to First Amendment protection.[2]

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[2] *See Hopper v. City of Pasco*, 241 F.3d 1067, 1081 (9th Cir. 2001) (artist challenging city refusal to display sculpture of a naked woman and prints depicting a naked couple in a public forum). Indeed, this Court has ruled that "'barroom' type nude dancing" is protected by the First Amendment. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). The more serious artistic endeavor of creating a custom-designed wedding cake to celebrate marriage is certainly within the protections of the First Amendment.

A similar contrast can be drawn between artistic expression here and the homoerotic photographs of Robert Mapplethorpe and photograph of a crucifix submerged in urine that sparked the dispute in *National Endowment for the Arts v. Finley*, 524 U.S. 569,

For example, simply because an artist accepts payment to design a memorial placed on the National Mall[3] does not forever deprive the artist of the freedom to reject proposed future commissions that conflict with the artist's beliefs. The First Amendment protects individuals from government commands that they express a message not their own and with which they disagree.

This Court has consistently held that an individual cannot be compelled to speak a message with which he disagrees, irrespective of whose message it is. *E.g.*, *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2288-89 (2012); *Keller v. State Bar of Cal.*, 496 U.S. 1, 9-10 (1990); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. at 796-97; *Pacific Gas & Elect. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 19 (1984); *Abood*, 431 U.S. at 234-35; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254 (1974)

This Court's decisions in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), are both clear teachings on this simple rule. Yet the court below, relying on the New Mexico decision in *Elane Photography*, sought to distinguish *Barnette* and *Wooley*

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574 (1998). The dissent in that case characterized the restrictions enacted by Congress as "viewpoint discrimination" over "expressive activity." *Id.* at 601 (Souter, J., dissenting).

[3] In accepting the design, the government has its own message—much like the couple who commission the custom-designed wedding cake will have their own message. Nonetheless, the artist who creates the design has her own message as well. *See* Maya Lin, *Making the Memorial*, New York Review of Books, November 2, 2000 (available at http://www.nybooks.com/articles/2000/11/02/making-the-memorial/ (last visited September 4, 2017).

by limiting those cases to their facts. Since the Colorado law does not require Masterpiece to convey a "particularized message," the lower court argued that those rulings were simply inapplicable. *Craig*, 370 P.3d at 286 (citing *Elane*, 309 P.3d at 64-69). That distinction, however, finds no support in this Court's rulings.

For instance, in *Riley*, this Court struck down a state law that required professional solicitors of charitable donations to disclose financial information. *Riley*, 487 U.S. at 795. This Court held that laws that mandate the content of speech were content-based regulations, subject to strict scrutiny, *id.*, because the freedom of speech necessarily includes "both what to say and what not to say," *id.* at 797. That the Court cited *Wooley* and *Barnette* as support for its conclusions is the best evidence that the Court does not consider those cases limited to instances where the regulation "require[s] an individual to 'speak the government's message.'" Applied to this case, *Riley* stands for the proposition that Colorado may not compel commercial artist to express a message with which they disagree.

Another line of this Court's cases makes this same point. In *Knox*, *Abood*, and *Keller*, this Court ruled that assessing compulsory fees to be used for political speech "constitute a form of compelled speech" and thus triggered First Amendment scrutiny. *Knox*, 132 S. Ct. at 2289; *see also Abood*, 431 U.S. at 235 (citing *Barnette*); *Keller*, 496 U.S. at 9-10. These cases demonstrate that even when compelled speech is indirect it is still constitutionally problematic.

The Colorado court (again, relying on the New Mexico decision in *Elane Photography*) also tried to

distinguish these cases by arguing that the compelled speech would not be attributed to Masterpiece Cakeshop. That, however, is not the test for whether compelled speech triggers First Amendment scrutiny.

The court below argued that the decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), requires an element of "perceived endorsement" before compelled speech violates the First Amendment. The problem, however, is that this is a misreading of *Hurley*. This Court noted the possibility that parade viewers might mistakenly think the organizers sponsored the message of each individual float. However, the Court declined to base its decision "on the likelihood of misattribution." *Id.* at 577. Like Massachusetts in *Hurley*, Colorado claims its law is necessary to prevent discrimination in a public accommodation. This Court rejected that rationale as a basis for burdening speech rights. States are "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579. The Colorado court made it very clear that it was the Masterpiece Cakeshop's message that the state found disdainful. *Craig*, 370 P.3d at 282. That is not a basis, however, for suppression of speech. As applied in this case, the Colorado law violates the Free Speech Clause of the First Amendment.

II. Discrimination by State Courts Against People Who Refuse to Renounce Their Religious Beliefs Is Well-Documented and Increasing.

Notwithstanding this Court's assurance in *Obergefell* that the decision would not impact the exercise

of religion by people who believed that same-sex marriage is contrary to their faith, (135 S. Ct. at 2607) states like Colorado are increasingly punishing people of faith for refusing to express support for same-sex marriage. Many individuals running small businesses according to their faith cannot in good conscience obey such laws. But the effect of the ruinous fines imposed to enforce laws requiring religiously conscientious business owners to service same-sex weddings has been to purge many religiously motivated individuals and their businesses from the marketplace altogether.

This Court conceded that many Americans oppose same-sex marriage because of "decent and honorable religious or philosophical premises" and that "neither they nor their beliefs [should be] disparaged." *Obergefell*, 135 S. Ct. at 2607. In this case, the court below disagreed. It noted that petitioner's religious belief contrary to same-sex marriage is indeed proof of intent to discriminate on the basis of sexual orientation status. *Craig*, 370 P.3d at 282. The court characterized these religious beliefs as demonstrating an "'irrational object of disfavor.'" *Id.* (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)). It is obvious that the court holds the religious beliefs of the petitioner in disdain rather than regard them as "decent and honorable." *Compare Obergefell*, 135 S. Ct. at 2607 *with Masterpiece Cakeshop*, 370 P.3d at 282. Yet the court below is not alone in this disdain of the beliefs of millions of Christians, Jews, and Muslims in America. Discrimination against those who refuse to renounce their religious beliefs is well documented and increasing.

The enforcement of non-discrimination laws on same-sex marriage, sexual orientation, and gender

identity against those who refuse to violate their religious beliefs on these matters has resulted in widespread denial of religious liberty. Today, 18 states have fully inclusive non-discrimination protections in so-called public accommodations covering sexual orientation or gender identity.[4] The call for "tolerance" that was so prevalent before *Obergefell* has now turned to calls for punishment for all who disagree. State courts are assisting those calling for such punishment. There is a growing number of incidents of individuals being sanctioned for declining to expressively or artistically participate in the celebration of a same-sex wedding ceremony. Many state governments are intent on penalizing individuals running small businesses with religious objections to same-sex marriage.

Cynthia and Robert Gifford are farm owners in upstate New York. They rent out their facility, Liberty Ridge Farm, for birthdays and weddings. Because of their Christian belief about marriage, however, they do not rent their farm for same-sex wedding ceremonies. In 2012, when a same-sex couple requested to use Liberty Ridge Farm for their wedding ceremony, the Giffords declined to hold the event at their farm. But, under New York's Human Rights law, an administrative law judge found the Giffords had discriminated against the same-sex couple because of their sexual orientation, holding that the farm was a place of public accommodation. In order to penalize and to force the Giffords to host same-sex marriage ceremonies in the future, the state Division

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[4] *Map: How Many States Still Lack Clear Non-Discrimination Protections*, Human Rights Campaign (July 10, 2015), https://www.hrc.org/blog/map-how-many-states-still-lack-clear-non-discrimination-protections.

of Human Rights fined the Giffords $10,000 and ordered them to pay the women each $1,500. A New York appellate court upheld the order and the fines as "appropriate action" to eliminate discrimination. *Gifford v. McCarthy*, 137 A.D.3d 30, 43 (N.Y. 2016). Since the commencement of the action, the Giffords have stopped renting their farm as a venue for wedding ceremonies entirely.

In a similar incident, in New Jersey, a United Methodist facility known as Ocean Grove Camp Meeting Association declined to host civil union ceremonies for two lesbian couples at its seaside Boardwalk Pavilion because the events were contrary to the Association's religious beliefs. The Association was "fundamentally a religious organization, free to frame its mission without governmental oversight or instruction," but, by refusing to host a same-sex marriage ceremony, a state administrative law judge concluded the Association had violated New Jersey's non-discrimination law. *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09, 2012 WL 169302, at *3-5 (N.J. Adm., Jan. 12, 2012). Because of its refusal to host same-sex weddings, the facility's state tax exempt status was also revoked. Jill P. Capuzzo, *Groups Loses Tax Break Over Gay Union Issue*, N.Y. Times (Sept. 18, 2007), www.Nytimes.com/2007/09/18/nyregion/18grove.html.

In Illinois, the owner of a bed and breakfast inn had a religious objection to hosting a civil union ceremony for a same-sex couple. A judge ordered the owner to pay damages for discrimination. *Court upholds $80,000 fine against B&B over refusal of same-sex civil union ceremony*, The Chicago Tribune (Aug. 17, 2017, 8:52 AM), www.chicagotribune.com/news/ct-

bed-breakfast-civil-union-ruling-0818-2017817-story.html.

Besides the owners of wedding venues, individuals specializing in creative services associated with weddings are suffering penalties for practicing their faith. In Oregon, Melissa and Aaron Klein do business as Sweet Cakes by Melissa. In 2013, for religious reasons, the Kleins declined to bake a custom wedding cake for the same-sex marriage of Rachel Cryer and Laurel Bowman. The Kleins believed that to bake the cake would be to facilitate and to celebrate the same-sex couple's marriage and, therefore, violate the Kleins' religious faith. Cryer and Bowman filed a complaint against Sweet Cakes by Melissa under the Oregon Equality Act of 2007, which prohibits discrimination on the basis of sexual orientation. The state Bureau of Labor and Industries determined the Kleins' refusal was unlawful discrimination and imposed massive fines. The Kleins were required to pay $135,000 for mental, emotional, and physical damages to the same-sex couple. *Klein v. BOLI*, 34 BOLI 102, 2015 WL 4868796, at *23 (Or. BOLI, July 2, 2015). Sweet Cakes by Melissa has been forced out of business since 2013. Kari Bray, *Gresham bakery that refused to bake same-sex wedding cake closes shop* (Sept. 1, 2013, 2:17 PM), www.oregonlive.com/gresham/index.ssf/2013/09/gresham_bakery_that_refused_to.html.

More recently, a floral artist named Barronelle Stutzman refused to create flower arrangements for a same-sex wedding. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 554 (Wash. 2017) (Petition for Writ of Certiorari pending, No. 17-108). Mrs. Stutzman, on behalf of her business, Arlene's Flowers, did not discriminate

in choosing her customers because of their sexual orientation. Indeed, she had designed and created thousands of dollars worth of floral arrangements for Robert Ingersoll and his same-sex partner, Curt Freed, over an approximately nine-year period. However, because of her sincerely held Christian belief about marriage, she could not create custom arrangements to celebrate the couple's wedding. Her choice was between "abiding by [her] religion or saving [her] business." *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1156 (10th Cir. 2013, Gorsuch, J., concurring) (*aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)). Mrs. Stutzman was sanctioned for her refusal under Washington's Law Against Discrimination in any place of public accommodation.

Small business owners specializing in services associated with weddings are not the only individuals being forced to violate their religious beliefs or else suffer the loss of their livelihood in their chosen profession. The Stormans family runs their Ralph's Thriftway pharmacy in Olympia, Washington according to their religious beliefs. They do not stock, for example, emergency contraceptive drugs because they are devout Christians who believe that life begins at conception. Pharmacists Rhonda Mesler and Margo Thelen work at other drugstores and are likewise unwilling to dispense the morning-after pill for religious reasons. Before 2007, the pharmacists referred customers asking for such drugs to another pharmacy nearby.

But, in the State of Washington, a druggist must stock and sell emergency contraceptive drugs and devices, including drugs that induce abortions. There

are no exceptions for pharmacists with religious objections. Wash. Admin. Code § 246–869–010(1) (2009). Their only choice is to violate their religious principles or go out of business. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert denied* 136 S. Ct. 2433 (2016)).

This court ruled that Americans should be free to live and to love how they choose. But legal requirements compelling individuals to renounce their religious faith, as a condition of earning a living is *not* the state authorizing sexual liberty and normalizing all-inclusive sexual behavior and identity. Rather, the enforcement of such laws is a state-sanctioned effort to deny religious believers of all three major religions the liberty to act in accordance with their beliefs. This does not accord with the original understanding of Free Exercise Clause of the First Amendment.

III. The Original Understanding of the Free Exercise Clause at the Time of the Ratification of the First Amendment Was a Broad Prohibition of Government Compulsion to Violate Religious Beliefs.

Important clues to the scope of religious liberty the Founders recognized and intended to protect in the First Amendment can be found in the writings of James Madison, the record of the First Congress, the 1787 Constitution, and the actual practices of state governments at the time of the founding.

A. The higher duty rationale supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

The Free Exercise of Religion contained in the First Amendment reflects a pre-governmental, higher

duty to the Creator. Because this fundamental right pre-existed the Constitution, the Court should broadly accommodate Free Exercise claims. James Madison articulated the principal religious argument for the right to accommodation of religion directly under the First Amendment in his famous attack on Patrick Henry's general assessment bill, *Memorial and Remonstrance.*

Madison defined religion in that as "the duty we owe to our Creator." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), ¶ 11 reprinted in 5 THE FOUNDERS CONSTITUTION 83 (Phillip Kurland and Ralph Lerner, eds.) (Univ. of Chicago Press 1987). Because beliefs cannot be compelled, he wrote, the "[r]eligion...of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate." *Id.* According to Madison, the free exercise of religion is, by its nature, an inalienable right because a person's beliefs "cannot follow the dictates of other men" and because religion involves a "duty towards the Creator." *Id.* He went on to explain, "This duty [towards the Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society" and, therefore, "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Id.*

The right to Free Exercise of Religion, Madison reasoned, precedes civil society and is superior even to legitimate government. In *City of Boerne v. Flores,* Justice O'Connor pointed out that "Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution

or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law." *City of Boerne v. Flores*, 521 U.S. 507, 561 (1997) (O'Connor, J., dissenting). The Founders appealed to "the Laws of Nature and Nature's God" to justify signing the Declaration of Independence. Decl. of Independence, ¶ 1. Free Exercise claims likewise entail duties to a higher authority. Because the Founders operated on the belief that God was real, the consequence of refusing to exempt Free Exercise claimants from even facially benign laws would have been to unjustly require people of faith to "sin and incur divine wrath." William Penn, *The Great Case for Liberty of Conscience* (1670) in WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002).

Madison, therefore, did not conceive "of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law," *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting), but rather he believed that citizens have the individual liberty under the Free Exercise Clause to live in accord with their faith. Madison observed that in matters of religion, a man "cannot follow the dictates of other men." *Memorial and Remonstrance*, 5 THE FOUNDERS CONSTITUTION 83.

B. The record of the First Congress supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

There was only one treatment of accommodation of religion from generally applicable laws in the record of the First Congress. A special committee had proposed a provision on religion declaring "no person religiously scrupulous shall be compelled to bear arms." 1 Annals of Cong. 749 (J. Gales ed. 1834) (Aug. 17, 1789). The discussion that followed tends to show the Founders recognized, as part of their legal landscape, broad accommodation of religion.

Representative Jackson proposed to modify the provision to accommodate people who were religiously scrupulous against bearing arms to require that those individuals pay for a substitute. 1 Annals of Cong. 750 (J. Gales ed. 1834) (proposal of Rep. Jackson, Aug. 17, 1789). Representative Sherman objected to Jackson's "upon paying an equivalent" modification, however. Sherman reminded his colleagues "those who are religiously scrupulous at bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other." 1 Annals of Cong. 750 (J. Gales ed. 1834) (remark of Rep. Sherman, Aug. 17, 1789).

In Sherman's view, a separate provision like Jackson proposed was not absolutely necessary to protect religious conscience because our national charter was unlike the seventeenth-century governments that arbitrarily threatened the liberty of conscience and other inalienable rights. *Id.* On the contrary, Sherman stated, "[w]e do not live under an arbitrary Government." *Id.* The implication of Sherman's remarks is that no express, textual protection was needed in the Bill of Rights over and above the Free Exercise Clause for those situations where the Founders predicted potential conflicts between a common, secular

task and a religious belief because refusing to accommodate pacifist sects like the Quakers and Moravians from military service would be the very definition of arbitrary government.

Sherman's view that Congress had nothing to do with religion was very common at the time the First Amendment was ratified. But even the position of the representatives who believed the provision was essential to Free Exercise, like Elias Boudinot who hoped the new government would show the world that the United States would not restrict anyone's religious exercise, "strongly suggests that the general idea of free exercise exemptions was part of the legal culture." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1501 (1990). That the Founders recognized and intended to protect the importance of religious conscience, which may sometimes conflict with federal practice, is further supported by the noticeable parallel between that proposal and the Oath Clause, which ended up in the 1787 Constitution.

C. The Oath Clause supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

The 1787 Constitution contained an express recognition of religious exercise. The Oath Clause contemplated a protection for Free Exercise of Religion for those situations in which the Founders foresaw a potential conflict between federal practice and individual liberties.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state

> legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath *or affirmation*, to support this Constitution.

U.S. Const., Art. VI (emphasis added). Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or Affirmation*:--'I do solemnly swear (*or affirm*)...."

The exception for "affirmations" was an important addition to preserve religious exercise. Oaths were not sworn under penalty of secular punishment. The concept of an oath at the time of the founding was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. Letter from James Madison to Edmund Pendleton, 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, (John P. Kaminski, *et al.* eds. (Univ. of Virginia Press (2009)) at 125 ("Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?").

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths. In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion. The Constitution, however, resolved this concern by providing that public office holders could swear an oath *or* give an affirmation. This religious

liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead protected freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

D. Historical practices at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

All the early state constitutions sought to guarantee the Free Exercise of Religion. In every state the government had no power to prohibit peaceful religious exercise. Some state constitutions included the pragmatic Jeffersonian provision permitting governmental interference with religiously motivated acts against public peace and good order. But those state constitutions challenge the idea that religiously informed conduct as opposed to mere beliefs is not protected against generally applicable laws. *E.g.*, N.Y. Const. (1777), section 38; Mass. Const. (1780), art. II. Rather, in recognizing exceptions to Free Exercise even where the individual's acts are religiously motivated, those provisos tend to confirm that the founding generation understood "free exercise" to mean "freedom of action" and to include conduct as well as belief.

State efforts to ensure religious liberty focused on preventing government compulsion of ordinary citizens to violate their religious beliefs. Thus, some

state constitutions contained religious conscience exemptions. The constitution of New Jersey, for example, excused any person from paying religious taxes. Const. of N.J. (1776), art. 18. Delaware, New Hampshire, New York, and Pennsylvania included exemptions from militia service for Quakers in their state constitutions. Stephen M. Kohn, JAILED FOR PEACE, THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS 1658-1985 (Praeger 1987). Statutes containing a similar exemption from militia service for Quakers were enacted in Georgia, Rhode Island, and Virginia. Margaret E. Hirst, THE QUAKERS IN PEACE AND WAR, (Garland 1972) at 331, 396-97. These early protections acknowledged the Quakers' higher duty to their Creator and accepted that Quaker religious belief forbade the use of arms and chose to honor religious liberty even at the expense of additional soldiers.

This protection of religious liberty is most clearly illustrated during the Revolutionary War where the religious consciences of religiously motivated pacifists were treated with great delicacy. If ever there was a "compelling governmental interest," certainly it was the muster of every able-bodied man to prepare to defend towns from the oncoming British army. Yet George Washington would not compel Quakers to fight. Indeed, when some Quakers were forced to march into Washington's camp at Valley Forge with muskets strapped to their back, Washington ordered their release. *Id.* at 396.

Washington's commitment to this accommodation of religious conscience was also demonstrated in the orders he issued to towns that were in the path of the British army's march. In January 1777, as the British army advanced on Philadelphia, Washington ordered "that every person able to bear arms (*except such as*

are Conscientiously scrupulous against in every case) should give their personal service." George Washington, Letter of January 19, 1777, in JAILED FOR PEACE, *supra* at 10 (emphasis added). The call for every man to "stand ready...against hostile invasion" was not a simple request. The order included the injunction that "every person, who may neglect or refuse to comply with this order, within Thirty days from the date hereof, will be deemed adherents to the King of Great Britain, and treated as common enemies of the American states." Proclamation issued January 25, 1777 in GEORGE WASHINGTON, A COLLECTION, W. B. Allen (Liberty Classics 1988) at 85. Again, however, the order expressly excused those "conscientiously scrupulous against bearing arms." *Id.* Even in the face of the most extreme need for militia to resist the British army, Washington's army would not compel Quakers and Mennonites to violate their religious beliefs.

These examples demonstrate that the founding generation understood religious liberty to mean that even generally applicable laws do not permit government to compel a citizen to violate his religious beliefs. The original understanding of the Free Exercise Clause thus forbids the State of Washington from compelling Mr. Phillips to violate his religious beliefs.

CONCLUSION

The First Amendment protects against compelled speech and further protects the affirmative Free Exercise of religion. This Court should reverse the decision of the Colorado state court.

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Respectfully submitted,

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